Supreme Court, U. S.
FILED
JUN 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1546

MONTANA CONTRACTORS' ASSOCIATION, a Montana non-profit corporation; and LLOYD C. LOCKREM, INC., a Montana corporation, *Appellants,*

v.

THE SECRETARY OF COMMERCE OF THE UNITED STATES, THE MONTANA STATE DISTRICT OFFICER OF THE MONTANA ECONOMIC DEVELOPMENT ADMINISTRATION, and THE CITY OF KALISPELL, *Appellees.*

LLOYD C. LOCKREM, INC., a Montana corporation, *Appellant,*

v.

THE SECRETARY OF COMMERCE OF THE UNITED STATES, *et al, Appellees.*

On Appeal From the United States District Court for the District of Montana

REPLY BRIEF FOR PLAINTIFF-APPELLANTS

ROBERT J. HICKEY
CLAUDIA M. JAMES
KIRLIN, CAMPBELL & KEATING
1150 Connecticut Avenue, NW
Washington, DC 20036

URBAN L. ROTH
POORE, ROTH, ROBISCHON & ROBINSON
1341 Harrison Avenue
Butte, Montana 59701

Counsel for Appellants

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1546

MONTANA CONTRACTORS' ASSOCIATION, a Montana non-profit corporation; and LLOYD C. LOCKREM, INC., a Montana corporation, *Appellants,*

v.

THE SECRETARY OF COMMERCE OF THE UNITED STATES, THE MONTANA STATE DISTRICT OFFICER OF THE MONTANA ECONOMIC DEVELOPMENT ADMINISTRATION, and THE CITY OF KALISPELL, *Appellees.*

LLOYD C. LOCKREM, INC., a Montana corporation, *Appellant,*

v.

THE SECRETARY OF COMMERCE OF THE UNITED STATES, *et al, Appellees.*

On Appeal From the United States District Court for the District of Montana

---

REPLY BRIEF FOR PLAINTIFF-APPELLANTS

The United States, Defendant-Appellee in No. 78-1546, in its Motion to Affirm or Dismiss argues that this Court lacks jurisdiction of appellants' appeal (Appellee's Motion to Dismiss or Affirm 6-9). This Court

has jurisdiction over this action under 28 U.S.C. § 1252. This statute (28 U.S.C. § 1252) clearly provides on its face that "any party" may appeal to the Supreme Court from an interlocutory or final judgment, decree, or order of any court in the United States holding an act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States is a party.[1] In 78-1546 appellants Montana Contractors Association and Lloyd C. Lockrem, Inc., plaintiffs in the district court, appealed the final judgment of the United States District Court for the District of Montana which found Sec. 103(f)(2), the Minority Business Enterprise requirements [MBE] of the Public Works Employment Act of 1977, [PWEA], Pub. L. No. 95-28, 91 Stat 117, 42 U.S.C. § 6705(f)(2), unconstitutional but denied plaintiffs any damages against local or federal defendants for violation of their constitutional rights.

There are no cases in which this Court has ruled that plaintiffs lack jurisdiction to bring a direct appeal under 28 U.S.C. 1252. The cases which are cited by the

[1] 28 U.S.C. 1252 provides:

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

federal appellee (Appellee's Motion to Dismiss or Affirm 8) as the basis for its assertion that the Court lacks jurisdiction over this appeal are clearly distinguishable from this case.[2] None of the cases cited by the federal appellee involved a decision in which a court found a statute unconstitutional on its face, as did the district court in this case. (J. S. App. 10a-13a). Appellants submit that under 28 U.S.C. 1252 this Court has jurisdiction of its appeal, which is based on a final judgment, in which the district court found a federal statute unconstitutional but denied appellants damages against federal or local appellees for violation of their constitutional rights.

Federal appellee's assertion that the issue of appellants' right to damages for constitutional violations is insubstantial, is clearly misguided. This Court's consideration of this issue in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971); *Butz* v. *Economou,* 438 U.S. 478 (1978) and its recent decision in *Davis* v. *Passman,* 47 LW 4643 (June 5, 1979) clearly demonstrates that this Court does not regard this issue as insubstantial.[3]

[2] In *Norton* v. *Matthews,* 427 U.S. 524 (1976) (Appellee's Motion to Dismiss or Affirm 8), this Court found that it lacked jurisdiction under 28 U.S.C. § 1252 to review a holding that executive officers had applied an act of Congress in an unconstitutional manner. In *United States* v. *Christian Echoes National Ministry, Inc.,* 404 U.S. 561 (1972) (Appellee's Motion to Dismiss or Affirm 8), this Court found that it lacked jurisdiction under 28 U.S.C. § 1252 of an appeal from a holding construing an act of Congress so as to avoid its unconstitutionality.

[3] In *Bivens, supra* this Court held that a plaintiff may bring a damage action for violation of his Fourth Amendment rights. This holding was reaffirmed by the Court in *Butz* v. *Economou, supra.*

In *Davis* v. *Passman, supra* at 4644, this Court held that Plaintiff who had alleged a violation of her constitutional right to due process under the Fifth Amendment asserted a constitutionally protected right, stated a cause of action which asserts this right, and that relief in damages constituted an appropriate form of remedy. In No. 1546, the appellants sought damages in the district court for violation of their constitutional rights under the Fifth and Fourteenth Amendments. The court found that the MBE provisions of the PWEA denied appellants equal protection and therefore violated the Constitution. However, the court refused to consider damages against local or federal defendants. J. S. App. 13a, 14a, 20a-21a. In refusing to consider the damage claims, the district court erred as a matter of law, especially in the light of *Davis* v. *Passman* in which this Court clearly recognizes the right of plaintiff to seek relief in damages for violation of a constitutionally protected right under the Fifth Amendment.

Federal appellee also argues (Appellee's Motion to Dismiss or Affirm 9-10) that the standard of review for the district court's denial of appellant's motions in Montana II to amend its complaint to plead damages against federal appellees is an abuse of discretion and therefore renders the issue of whether appellants were entitled to plead and recover damages insubstantial. The district court's refusal to allow the appellant to amend their complaint was based on its determination that appellants did not have a right to seek damages. J. S. App. 14a. It was not based on discretionary factors, e.g. prejudice to other party, which a court considers under Rule 15(a) of the Federal Rules of Civil Procedure in determining whether to allow an amendment of a pleading. These facts are not disputed by federal appellee. (Appellee's Motion to Dismiss or Affirm 9). Thus, the substantial issue before this Court is whether the district court erred in refusing to recognize that appellants had a right to bring a damage claim against federal appellee and recover damages for violation of their constitutional rights.

Under ~~*Morrell*~~ MONNELL v. *Dept. of Social Services,* 436 U.S. 658 (1978), damages against local officials is an appropriate form of remedy for a constitutional violation. Appellants in Montana II pleaded damages against local appellees in their original complaint, but the court refused to consider damages against local appellees.[4] J. S. App. 22a-49a; 19a-21a, 13a.

Even if this Court were to decline to review the district court's failure to award damages against federal appellee as a result of its refusal to allow plaintiffs to amend their complaint to plead damages against such appellee, it would still be faced with the substantial question of whether the district court erred as a matter of law in refusing to consider whether appellants were entitled to damages against local appellees for violation of their constitutional rights.

---

[4] Federal appellee argues with respect to the damage claims of plaintiffs in Montana I, (Appellee's Motion to Dismiss or Affirm 12) that the claims of a party may not be enlarged on appeal. Appellants submit that they have not enlarged their claims on appeal. In its complaint, appellants in Montana I requested general relief which would include damages. J. S. App. 60a.

For the foregoing reasons and the reasons set forth in its jurisdictional statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

ROBERT J. HICKEY
CLAUDIA M. JAMES
KIRLIN, CAMPBELL & KEATING
1150 Connecticut Avenue, NW
Washington, DC 20036

URBAN L. ROTH
POORE, ROTH, ROBISCHON & ROBINSON
1341 Harrison Avenue
Butte, Montana 59701

Counsel for Appellants

June 11, 1979